

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

IN RE PHARMACEUTICAL INDUSTRY
AVERAGE WHOLESALE PRICE LITIGATION

MDL No. 1456

THIS DOCUMENT RELATES TO:

CIVIL ACTION: 01-CV-12257-PBS

ALL ACTIONS

Judge Patti B. Saris

**PLAINTIFFS' RESPONSE TO SCHERING-PLOUGH CORPORATION'S
OPPOSITION TO PLAINTIFFS' EMERGENCY MOTION TO COMPEL
PRODUCTION OF DOCUMENTS AND DATA UNDERLYING
CRIMINAL PLEA AND SETTLEMENT AGREEMENT**

Plaintiffs brought the emergency motion to compel to resolve a discovery stand-off with Schering-Plough in the wake of factual revelations arising from the Schering's recent criminal plea and civil settlement. Plaintiffs' specific and discrete request is that they be granted access to documents and data underlying the plea and settlement because the information is responsive to outstanding discovery requests to Schering that were propounded long ago. Not even Schering disputes that the two cases have common facts and conduct at their core. The settlement agreement, press releases from the parties and media accounts strongly suggest that there is a huge overlap in the cases. Schering has refused to identify where in the MDL litigation the factual materials relating to the facts referred to in the plea and settlement regarding inducements paid to doctors for prescribing Temodar or Intron were produced. Schering's refusal to do so is a tacit admission that they were not produced.

Schering-Plough's opposition, on the other hand, conflates the straightforward discovery issue with the more complex question of how Schering's plea and settlement may affect the legal

issues in this case. By doing so, Schering deliberately misses the point. Plaintiffs have not yet asked the Court to resolve whether the criminal plea or settlement has any collateral effect as to the claims and issues in this case. That question is not before the Court. Similarly, whether or not AWP was part of the government's case is not dispositive of this motion and does not determine relevancy.

Plaintiffs have demonstrated relevance. If doctors were induced to prescribe drugs, by any form of payment, such payment lowered the cost to the doctors and, according to the OIG guidelines, inflated AWP. It is hard to imagine how such inducement evidence is not relevant. And plaintiffs bring this motion as an emergency due to the imminency of the trial. Schering has potentially been caught red handed obfuscating or hiding critical discovery and it should not profit from such conduct.

CONCLUSION

For all of these reasons and the reasons set forth more fully in plaintiffs' motion, Schering must supplement its discovery responses.

DATED: September 27, 2006.

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CERTIFICATE OF SERVICE BY LEXISNEXIS FILE & SERVE
Docket No. MDL 1456

I, Steve W. Berman, hereby certify that I am one of plaintiffs' attorneys and that, on September 27, 2006, I caused copies of **PLAINTIFFS' RESPONSE TO SCHERING-PLough CORPORATION'S OPPOSITION TO PLAINTIFFS' EMERGENCY MOTION TO COMPEL PRODUCTION OF DOCUMENTS AND DATA UNDERLYING CRIMINAL PLEA AND SETTLEMENT AGREEMENT** to be served on all counsel of record by causing same to be posted electronically via Lexis-Nexis File & Serve.

/s/ Steve W. Berman

Steve W. Berman